

ST 97-44

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
v.)	No.
)	NPL:
JOHN DOE, as responsible)	
officer of CORPORATION)	C. O'Donoghue
)	Admin. Law Judge
Taxpayer)	
)	

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Alan Levin, of the Law Offices of Wayne & Levin for JOHN DOE; Mr. Marc Muchin, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to JOHN DOE's (hereinafter referred to as "taxpayer") timely protest of the Notice of Penalty Liability issued by the Department on April 20, 1995 for tax liability under the Retailers' Occupation Tax Act ("ROTA"). Such Notice of Penalty Liability was issued to JOHN DOE as a responsible officer of CORPORATION ("CORPORATION") pursuant to Section 35 **ILCS** 120/13.5 of the ROTA for the periods January 1991 through February 1993.

The issues to be resolved are: 1) whether the taxpayer was a responsible officer or employee of CORPORATION, and 2) whether the taxpayer willfully failed to pay such taxes to the Department. Following submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer.

Findings of Fact:

1. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Notice of Penalty Liability. Department Ex. No. 2.

2. CORPORATION was formed to supply fixtures for the interiors of retail stores. Tr. pp. 14, 35.

3. CORPORATION was established in 1990. Tr. p. 32. The company ceased operations in May of 1993. Tr. p. 30.

4. JIM DOE, JOHN DOE, MIKE DOE and ROBERT DOE were shareholders of CORPORATION. Tr. p. 15. JIM DOE, JOHN DOE and MIKE DOE each owned 22 percent of the corporation. Tr. pp. 16, 65. ROBERT DOE owned 34 percent of the company. Tr. p. 103.

5. ROBERT DOE was the president of CORPORATION. Tr. p. 15. JIM DOE and MIKE DOE were vice-presidents and JOHN DOE was the secretary of the corporation. Tr. p. 59.

6. MIKE DOE, JIM DOE and JOHN DOE were signatories on the corporate checking account. Tr. p. 61.

7. Two signatures were required to write a check. Tr. pp. 22, 61. ROBERT DOE was generally the second signature on corporate checks. Tr. pp. 22, 104.

8. Checks were generally prepared by the bookkeeper and signed by ROBERT DOE and one of the other three officers. Tr. pp. 24, 62. ROBERT DOE supervised the bookkeeper. Tr. p. 63.

9. JOHN DOE did not receive a salary from CORPORATION. Tr. p. 72.

10. JOHN DOE, MIKE DOE and JIM DOE did not prepare any of the tax returns. Tr. pp. 23, 118.

11. MIKE DOE, JIM DOE and JOHN DOE were not involved in the day to day operations of the corporation. Tr. pp. 64, 98. The only time they got involved with the business is when all four men were doing a mutual project together. Tr. p. 98.

12. JOHN DOE was not involved in the payment of bills. Tr. p. 72. He did not participate in choosing suppliers or in the hiring or firing of employees. Tr. p. 73.

13. ROBERT DOE worked with clients and oversaw the accounts payable and receivable. He was responsible for supervising the general day to day operations. Tr. pp. 95, 106. JOHN DOE, MIKE DOE and JIM DOE did not have any involvement in overseeing the books. Tr. p. 108.

14. ROBERT DOE hired the corporation's two outside accountants. Tr. p. 111. He also hired the corporation's bookkeeper. Tr. p. 114. The bookkeeper prepared the sales tax returns and the corresponding check. Tr. pp. 115, 117. This accountant was supervised by ROBERT DOE. Tr. p. 114.

15. MIKE DOE, JIM DOE and JOHN DOE are also officers of FIRM A and FIRM B. Tr. pp. 34, 66, 67. JIM DOE was the president of FIRM B. Tr. p. 31.

16. FIRM A is a construction management firm which builds retail projects. Tr. p. 35. FIRM B generates the design drawings for retail projects. Tr. p. 36. The three companies were located on the same premises. Tr. p. 46.

17. JOHN DOE, MIKE DOE and JIM DOE are officers of both FIRM A and FIRM B. Tr. p. 38. JOHN DOE is currently employed by FIRM A. Tr. p. 70 He has been employed there for 15 years. Tr. p. 70.

18. At times, the three companies would work on projects together. Tr. p. 36. JOHN DOE handled the construction aspect of a project. Tr. p. 98. MIKE DOE and JIM DOE would design the project. Tr. p. 98.

19. JOHN DOE, MIKE DOE and JIM DOE had a relatively small percentage of time input into the company's general business operations. Taxpayer Ex. No. 1; Tr. p. 110.

Conclusions of Law:

The Department seeks to impose personal liability on JOHN DOE pursuant to Section 13.5 of the Retailers' Occupation Tax Act which provides, in pertinent part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon; The Department shall determine a penalty due under this Section

according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. ...

35 **ILCS** 120/13.5 (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 ½). ¹

Section 13.5 is modeled after Section 6672 of the Internal Revenue Code, which imposes liability upon those individual persons actually responsible for an employer's failure to withhold and pay over the taxes. Branson v. The Department of Revenue, 168 Ill. 2d 247 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19 (1985).

In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. See, e.g., Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the withholding taxes are remitted to the Government. *Id.* Thus, the statute does not confine liability to the single most responsible person. Howard v. United States, 711 F.2d 729 (5th Cir. 1983).

The Department established its *prima facie* case against JOHN DOE through the introduction of the Notice of Penalty Liability. Although JOHN DOE was indeed a corporate officer, testimony of the Department's witness, ROBERT DOE, calls into question whether JOHN DOE had

¹. The Uniform Penalty and Interest Act, 35 **ILCS** 735/3-7, which provides for personal liability penalty, is effective for taxes incurred as of January 1, 1994.

sufficient control, supervision or responsibility for the filing of returns and the remittance of taxes due during the audit period. ROBERT DOE's testimony indicates that JOHN DOE was not involved in the corporation's day to day business operations, nor did he take part in decisions regarding the payment of creditors.

JOHN DOE was indeed a signatory on the corporate bank account, however, credible testimony was given that he signed checks when requested by ROBERT DOE or the bookkeeper, the two individuals who seem to have controlled the accounts payable. JOHN DOE never prepared the checks, request that a check be prepared or make a determination as to what creditors should be paid.

Nor did it appear that JOHN DOE supervised or controlled accounting personnel. It was ROBERT DOE who hired and fired personnel for the company. In fact, ROBERT DOE hired the two outside accountants and the bookkeeper who prepared the checks and the tax returns. ROBERT DOE testified that this bookkeeper was under his supervision and that he was responsible for the company's general business operations. ROBERT DOE admitted that JOHN DOE did not have much involvement in the corporation's day to day operations nor did he invest much time in the company. JOHN DOE did sign three tax returns during the audit period but credible testimony was given which indicated that he did this as a convenience because ROBERT DOE was unavailable. The record reflects that his involvement in the company centered around the construction of the retail projects and it appears that he lacked the requisite control and responsibility which would establish him as a responsible officer under the statute.

Based on the foregoing, I believe the taxpayer presented sufficient evidence to rebut the Department's *prima facie* case and, therefore, for the reasons stated above, it is my recommendation the Notice of Penalty Liability be cancelled.

Christine O'Donoghue
Administrative Law Judge